AEi2, LLC and Laborers International Union of North America, Local 199, AFL–CIO. Case 4–CA–32421

October 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On June 30, 2004, Administrative Law Judge Jane Vandeventer issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

1. The Respondent contends that the judge erroneously denied its motion to sequester witnesses at the hearing. The Respondent made its motion after opening statements. As a practical matter, the motion pertained only to Local 199 President William Carter because, as the Respondent concedes, the only other witnesses, Local 199 Organizer Gurvis Miner and General Manager Bernard McKenna, would have properly remained in the hearing room as party representatives.[3] The judge denied the motion as untimely. Even if this was an error,[4] the Respondent nonetheless has failed to establish any prejudice here. See *Medite of New Mexico, Inc.*, 314 NLRB 1145,1148–1149 (1994), enfd. 72 F.3d 780 (10th Cir. 1995) (*reversible* error will not be found unless the complaining party establishes prejudice). The critical event in this case was a discussion between Local 199 Organizer Miner and General Manager McKenna, in which Miner advised McKenna that Local 199 had rejected a side letter agreement containing a precedent to the Respondent's obligation to abide by Local 199's collective-bargaining agreement. Carter, however, was not present for that discussion, and thus did not testify about it. Moreover, even if the judge had granted the Respondent's sequestration motion, Local 199 would have been entitled to designate a representative to remain in the hearing room during the testimony and, likely, would have designated Carter. As a result, we find that the Respondent has not shown that it was prejudiced by Carter's presence in the hearing room.

2. In exceptions, the General Counsel and the Charging Party contend that the judge erroneously failed to provide an instatement order and make-whole relief for those work applicants who, but for the Respondent's unlawful repudiation of the collective-bargaining agreement, would have been referred to the Respondent for employment through the Union's hiring hall. We find merit in this contention, and shall modify the judge's Order accordingly. See *J. E. Brown Electric*, 315 NLRB 620 (1994); see also *Atlas Insulation, Inc.*, 338 NLRB No. 47 (2002).[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, AEi2, LLC, Berlin, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the Respondent unlawfully repudiated its collective-bargaining agreement with Local 199, we find it unnecessary to rely on the judge's discussion of parol evidence or her finding that the Respondent, by its conduct, adopted the agreement. The credited testimony establishes that General Manager McKenna signed Local 199's collective-bargaining agreement after Local 199 Organizer Miner informed him that Local 199 had rejected the side letter that set a condition for applying the contract. Further, in light of this credited testimony, we find no merit in the Respondent's argument that the judge erred in failing to draw an adverse inference against the General Counsel based on his failure to call another union representative who also informed McKenna, by telephone, that Local 199 had rejected the side letter. See *Tom Rice Buick*, 334 NLRB 785, 786 (2001) ("an adverse inference 'may be drawn,' not must be drawn, and 'the decision to draw an adverse inference lies within the sound discretion of the trier of fact'") (citations omitted).

[3] Miner would have been the General Counsel's party representative.

[4] See Fed.R.Evid. 615; see also 29 Wright & Miller, Federal Practice and Procedure Sec. 6244 (West 2004) (no time is specified for making a sequestration motion).

[5] Instatement and backpay issues will be resolved by a factual inquiry at the compliance stage of the proceeding. See *J. E. Brown Electric*, supra. In this regard, Chairman Battista finds it unnecessary now to decide issues concerning the validity of *J. E. Brown Electric*. See concurring opinions in *J. E. Brown Electric*, and in *Coulter's Carpet*, 338 NLRB No. 85 (2002); see also dissenting opinions in *M. J. Wood & Associates, Inc.*, 325 NLRB 1065, 1068 fn. 9 (1998), and in *Baker Electric*, 317 NLRB 335, 336 fn. 4 (1995).

"(d) Offer immediate and full employment to those applicants who would have been referred by the Union to the Respondent for employment were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by the Respondent's failure to hire them. Backpay is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Instatement and backpay issues will be resolved by a factual inquiry at the compliance stage of the proceeding. *J. E. Brown Electric*, 315 NLRB 620 (1994)."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. October 29, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Ronald Meisburg,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT repudiate the terms and conditions of our collective-bargaining agreement with Laborers International Union of North America, Local 199, AFL–CIO, during the term of the agreement.

WE WILL NOT fail and refuse to recognize and abide by the terms of that agreement.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to adhere to the terms of the collective-bargaining agreement, including but not limited to making contractually required payments to pension and other benefit funds that are mandatory subjects of bargaining and making dues-checkoff payments on behalf of employees who have authorized us to deduct them from their wages.

WE WILL NOT refuse or fail to provide relevant information requested by the Union for the purpose of carrying out its representational duties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, with interest, all employees in the bargaining unit for any loss of earnings or other benefits they may have suffered as a result of our unlawful failure and refusal to adhere to the terms of the collective-bargaining agreement.

WE WILL make whole, with interest, the unit employees by paying the pension and other benefit funds contributions mandated by the collective-bargaining agreement that we failed to make, and reimburse unit employees for expenses ensuing from our failure to make the required payments, with interest.

WE WILL remit to the Union the dues that employees through signed checkoffs authorized us to deduct from their wages, with interest.

WE WILL offer immediate and full employment to those applicants who would have been referred by the Union to the Respondent for employment were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by the Respondent's failure to hire them.

WE WILL immediately comply with the request for information from the Union dated April 2, 2003.

AEI2, LLC

Margaret M. McGovern, Esq., for the General Counsel.
John D. Meyer, Esq., for the Respondent.
Johathan Walters, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on April 12, 2004, in Philadelphia, Pennsylvania. The complaint alleges Respondent violated Section 8(a)(1) and (5) of the Act by repudiating a collective-bargaining agreement. The complaint also alleges Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish necessary and relevant information to the Union. The Respondent filed an answer denying the essential allegations in the complaint.

After the conclusion of the hearing, the parties filed briefs, which I have read.[1]

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Berlin, New Jersey, where it is engaged in the provision of asbestos abatement services to other businesses in the construction industry. During a representative 1-year period, Respondent performed services valued in excess of $50,000 outside the State of New Jersey. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

Respondent performs asbestos and lead abatement and removal work. Its offices are in Berlin, New Jersey, but its work is performed at various construction sites in New Jersey, Pennsylvania, New York, Delaware, and Maryland. This case is concerned only with Respondent's work in Delaware. Bernard (Bud) McKenna Jr. is the general manager of Respondent.

As early as February 2002, Gurvis Miner, then lead organizer for the Union, met and talked with McKenna about the Union's area agreement with the Delaware Contractors' Association (Allied Division of the Delaware Contractors' Association, herein DCA). The agreement in effect at that time was effective through April 30, 2002, at which time the parties negotiated a successor agreement (herein the current collective-bargaining agreement or the 2002–2004 agreement) effective from May 1, 2002, through April 30, 2004. The current collective-bargaining agreement was finalized by the DCA and the Delaware Laborers' Council sometime in July 2002.

Several times during the next several months, Miner and McKenna talked informally about the possibility of Respondent's becoming signatory to the collective-bargaining agreement. These conversations took place at jobsites where Respondent was working or at a diner in Delaware. Miner pointed out the advantages of the idea, and McKenna asked about concerns he had, such as the difference in the Delaware prevailing wage from that in the collective-bargaining agreement. The two also discussed work on particular jobsites, and visited two or three jobsites. While Miner and McKenna's recollections of these meetings differed in minor respects, the differences are not relevant to the issues in this case.

On June 21, 2002, Miner and McKenna met at Respondent's office to discuss the same subject. They agreed to some modifications to the DCA agreement, after consultation with the Union's Deputy Supervisor Terri Goodman. The modifications were embodied in a letter dated June 21, 2002 (the June 21 Side Letter). At the same meeting, McKenna signed a letter of intent, in which Respondent agreed to be bound by the successor DCA agreement which was then still being negotiated. The June 21 side letter contained a condition stating that the terms of the 2002–2004 collective-bargaining agreement would go into effect only when Respondent reached a total of $500,000 worth of business within Delaware. It is undisputed that Respondent had not reached this amount of business by the time of the trial herein.

A few weeks later, during July, Miner was informed by telephone that the June 21 side letter was not approved by the regional office of the Union. In early July, subsequent to this telephone call, Miner met briefly with McKenna at a school in Dover, Delaware, where Respondent was performing work. According to Miner, he stated to McKenna that the June 21 side letter was not approved, and McKenna replied that he knew that. According to Miner, McKenna stated "they called and said it was a no-go." Miner and McKenna agreed to meet again. While McKenna testified generally that he had not discussed the June 21 side letter with Miner during this encounter, he did not specifically deny Miner's testimony about his remarks. It is undisputed that there exists no writing denying approval of the June 21 side letter. I find that McKenna knew well before August 6, 2002, that the Regional Office of the Union had rejected the June 21 side letter.[2]

On August 6, 2002, Miner, accompanied by the Union's president, William Carter, met with McKenna at a diner in Delaware. They talked about the idea of Respondent's signing the new 2002–2004 collective-bargaining agreement. They also visited some large jobsites together. The three men then went to the Union's office. McKenna was given a copy of the 2002–2004 collective-bargaining agreement, which he read over. According to Miner and Carter, McKenna read over the agreement for an hour or thereabouts, asked a number of questions, and discussed a number of items, such as the prevailing wage. McKenna then signed the 2002–2004 collective-bargaining agreement and received a copy of it, including the signature page. It is undisputed that McKenna signed the agreement, and that no mention was made by McKenna on August 6, 2002, of the June 21 side letter. One provision of the 2002–2004 collective-bargaining agreement (article VIII) includes language stating that "the relationship of the parties is fully and exclusively set forth herein, and by no other means,

[1] The General Counsel also filed an unopposed motion to correct the transcript which is hereby granted.

[2] There were relatively few contradictions in the testimony of the witnesses. Most of the events which occurred are not in dispute. However, in the few instances where there are small differences in testimony, I credit Miner over McKenna. Miner's testimony demonstrated a better recall, was given clearly and in detail, and was corroborated on several points by the testimony of Carter. McKenna evinced a poor memory, at times contradicted himself, and at one point contradicted a writing he had authored. I find that his testimony is less reliable than that of Miner. Specifically, I credit Miner's testimony to the effect that McKenna acknowledged to Miner that he was aware that the letter of intent with the attached June 21 side letter had not been accepted as a collective-bargaining agreement by the regional office of the Union.

oral or written. Practices not part of the terms and conditions of this agreement will not be recognized."

In September 2002, McKenna telephoned Miner to discuss a prospective job bid for the Delaware De-lead Project. McKenna asked how many men the Union could supply who were licensed in lead abatement. Miner informed McKenna that some licensed workers were available, and the Union would train 20 additional workers. Subsequently, McKenna submitted a prequalifying bid on the job, identifying Respondent as a "Union contractor" and stating therein that Respondent would employ certified, trained workers from the Union. Respondent was awarded this job, and began work in February 2003. Respondent did not, in fact, obtain its workers for the Delaware De-Lead Project from the Union's referral system.

On March 17, 2003, McKenna sent a letter to the Union stating that Respondent was terminating the 2002–2004 collective-bargaining agreement immediately. Shortly thereafter, on April 2, 2003, the Union responded by letter stating that Respondent could not legally do so. In the same letter, the Union also requested information concerning Respondent's Delaware jobs, locations of jobs, general contractors' names, customers, and employee names for the previous 6 months. It is undisputed that Respondent never provided any of the requested information to the Union.

In the fall of 2003, the auditors of the joint benefit trust funds named in the collective-bargaining agreement conducted an audit of Respondent's payroll and benefit payments from August 6, 2002, through August 31, 2003. In doing so, the auditors of the funds had access to payroll records for a portion of this period, but not the entire period. It is likewise undisputed that the portion of the payroll records which were made available to these auditors by Respondent were never provided to the Union.

On November 5, 2003, after the charge in this matter had been filed, Respondent wrote a letter to the Board's regional office, with a copy to the Union, stating that it rescinded its March 17, 2003 letter.

In early 2004, Respondent notified the Union in a timely fashion of its intention to terminate the 2002–2004 collective-bargaining agreement at the end of the current term, April 30, 2004.

The General Counsel and the Charging Party take the position that the collective-bargaining agreement entered into by Respondent on August 6, 2002, is a complete and enforceable agreement, and that Respondent violated the Act by failing to apply the contract, and by repudiating it. Furthermore, they contend that Respondent also violated the Act by failing to provide the requested information to the Union.

The Respondent contends that the collective-bargaining agreement consists of the 2002–2004 collective-bargaining agreement signed on August 6, 2002, together with the June 21 side letter. Respondent further contends that the Board may not address contract issues, and that the current law governing 8(f) contracts should be reversed.

B. Discussion and Analysis

1. The applicable law

The leading case which defines the obligations of an employer who enters into a 8(f) agreement is *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988). The Board held that such agreements are enforceable under Section 8(a)(5) of the Act, and may not be unilaterally repudiated during their term. See also, *Gem Management Co.*, 339 NLRB No. 71, slip op. at 13 (2003).

In addition, the Board has held that a respondent's conduct may be evidence of adoption of a contract in the Section 8(f) context. Once an employer has voluntarily adopted a contract, it is foreclosed under *Deklewa* from repudiating it during its term. See, e.g., *E.S.P. Concrete***,** 327 NLRB 711, 712 (1999).

The Board has consistently applied the parol evidence rule when deciding issues relating to contracts. The Board has held that evidence of oral agreements which vary the terms of a written contract will not be given effect, nor will evidence of written conditions or amendments be given effect. See, e.g., *America Piles, Inc*., 333 NLRB 1118, 1119 (2001); *Sommerville Construction Co***.,** 327 NLRB 514 (1999); *W. J. Holloway & Son*, 307 NLRB 487 (1992); *Sheet Metal Workers Local 208 (Mueller Co.)*, 278 NLRB 638, 645 (1986).

2. The collective-bargaining agreement

The collective-bargaining agreement signed by the parties on August 6, 2002, was, by its terms, a complete agreement. Respondent contends that the June 21 side letter was a part of the agreement. However, the June 21 side letter is not attached to, nor referenced in the collective-bargaining agreement. It was not discussed at the August 6, 2002 meeting. It was not negotiated or entered into on that date, rather it had been negotiated some 6 weeks earlier. In addition, it had been specifically rejected by the Union's regional office several weeks before August 6, 2002. It is also undisputed that McKenna did not mention the June 21 side letter on August 6, 2002. All these factors demonstrate that the June 21 side letter was not made a part of the collective-bargaining agreement entered into on August 6, 2002. Board law clearly excludes it as parol evidence. I find, as the General Counsel contends, that the August 6, 2002, collective-bargaining agreement was the complete agreement between the parties, and that Respondent was bound by it.

Even if Respondent's contention that McKenna believed the June 21 side letter was a part of the collective-bargaining agreement were to be accepted, it is apparent that the mistake was his alone, and not shared by the Union. It is well settled that unilateral mistake is *not* grounds for rescission of a contract. See, e.g., *Carpenters Local 405***,** 328 NLRB 788, 794 (1999).

If more is needed, the General Counsel urges that Respondent's conduct in holding itself out to the State of Delaware as a union contractor amounts to "adoption by conduct." I find that Respondent's conduct in September and October 2002 supports such a finding. In addition, it shows that in September 2002, Respondent was not intending to wait until it had performed $500,000 worth of business to apply the contractual

terms, but was acting as if it were bound to the collective-bargaining agreement without that condition.

It is undisputed that Respondent did not adhere to the terms and conditions of employment set forth in the 2002–2004 collective-bargaining agreement. I find that Respondent, by repudiating the collective-bargaining agreement during its term, and by failing to adhere to the terms of a collective-bargaining agreement to which it was bound, Respondent has violated Section 8(a)(5) of the Act.

3. The request for information

It is undisputed that Respondent failed to provide the Union with information which is patently necessary to its administration of the collective-bargaining agreement. Since Respondent was bound to the collective-bargaining agreement it signed, the Union had a right to information which it needed in order to administer the contract and to monitor compliance with it. I find that Respondent has violated Section 8(a)(5) of the Act by failing and refusing to supply the necessary and relevant information requested by the Union on April 2, 2003. *Commonwealth Communications,* 335 NLRB 765 (2001), enfd. denied 312 F.3d 465 (D.C. Cir. 2002).

CONCLUSIONS OF LAW

1. By repudiating the 2002–2004 collective-bargaining agreement, Respondent has violated Section 8(a)(5) and (1) of the Act.

2. By failing to adhere to the terms and provisions of the 2002–2004 collective-bargaining agreement, Respondent has violated Section 8(a)(5) of the Act.

3. By failing and refusing to provide the Union with necessary and relevant information, Respondent has violated Section 8(a)(5) of the Act.

4. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. I shall recommend that Respondent be ordered to reimburse all its unit employees employed since August 6, 2002, for the deficiencies in their wage rates and other benefits. As for contractual benefit funds and other payments, the determination of which such payments Respondent should have made and the amounts necessary to remedy Respondent's failure to comply with its contractual obligations will be left to the compliance stage. See *Merryweather Optical Co.*, 240 NLRB 1213, 1217 fn. 7 (1979). Respondent shall comply with the provision of information requirements of the collective-bargaining agreement in order to allow the Union and the benefit funds trustees to calculate funds due and owing under the collective-bargaining agreement consistent with the findings and conclusions of this decision. Respondent shall also be required to make employees whole by reimbursing them for any expenses resulting from Respondent's failure to make required benefit fund payments in the manner prescribed in *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, AEi2, LLC, Berlin, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating the 2002–2004 collective-bargaining agreement.

(b) Failing to adhere to the terms and provisions of the 2002–2004 collective-bargaining agreement.

(c) Failing and refusing to provide the Union with necessary and relevant information.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately comply with the request for information from the Union dated April 2, 2003.

(b) Make whole, with interest, all employees in the bargaining unit for any loss of earnings or other benefits they may have suffered as a result of Respondent's failure and refusal to adhere to the terms of the collective-bargaining agreement.

(c) Make whole, with interest, the unit employees by paying the pension and other benefit funds, contributions mandated by the collective-bargaining agreement that Respondent failed to make, and reimburse unit employees for expenses ensuing from Respondent's failure to make the required payments, with interest, in the manner set forth in the remedy section of this decision.

(d) Remit to the Union the dues that employees through signed checkoffs authorized Respondent to deduct from their wages, with interest.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Berlin, New Jersey location copies of the attached notice marked "Appendix.[4]" Copies of the notice shall also be posted at all Respondent's Delaware jobsites, and mailed to all em-

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployees who were employed in Delaware from August 6, 2002, through April 30, 2004. Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 6, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., June 30, 2004.

APPENDIX

NOTICE TO EMPLOYEES
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An Agency of the United States Government

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Choose representatives to bargain with us on your behalf

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